Filed 10/19/16 In re L.Z. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re L.Z., et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.Z., Defendant and Appellant.	E065570 (Super.Ct.Nos. J260667, J260668, J260669) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Richard D. Pfeiffer, by appointment of the Court of Appeal, for Defendant and Appellant R.Z.

Jean-Rene Basle, County Counsel, Danielle E. Wuchenich and Dawn Messer, Deputy County Counsel, for Plaintiff and Respondent.

R.Z. (father) and Li.Z. (mother) took their four-month-old son L.Z. (sometimes baby) to the hospital because there was something wrong with his left arm. The father admitted grabbing his arm, supposedly to keep him from falling. Hospital personnel found that L.Z. had a freshly broken humerus. However, he also had healing breaks, two or three weeks old, in his radius and ulna. In addition, he was extremely underweight.

As a result, L.Z. and his older brothers A.Z. and S.Z. (collectively children) were detained and declared dependents. The father was denied reunification services. The father did not appeal from these rulings. Now, however, he appeals from an order summarily denying his "changed circumstances" petition under Welfare and Institutions Code section 388 (section 388), seeking reunification services. He also appeals from the order at the six-month review hearing, to the extent that it gave him visitation just once a week for two hours at a time.

We will hold that the trial court could properly deny the father's section 388 petition because it failed to make a prima facie case that reunification services would be in the best interest of the children. We will also hold that his challenge to the visitation order is forfeited as well as meritless.

I

FACTUAL AND PROCEDURAL BACKGROUND

In June 2015, when this dependency began, A.Z. was five, S.Z was three, and L.Z. was four months old.

One day, while the father was giving L.Z. a bath, the mother heard the baby crying. When the father brought him to her, his left arm did not look right. The father said that, as he was taking L.Z. out of the bathtub, he slipped out of his hands, so he grabbed L.Z.'s arm. The parents took L.Z. to Redlands Community Hospital, where he was found to have a broken humerus.

A social worker interviewed the father at the hospital. He gave essentially the same account as he had already given the mother, but he added that when he grabbed L.Z.'s arm, he heard a "'pop sound.'" A nurse stated that L.Z.'s injury appeared to be consistent with the parents' account.

Because the hospital did not have a pediatric team, it transferred L.Z. to Loma Linda University Medical Center. There, it was discovered that that L.Z. also had two healing fractures of his left radius and ulna, approximately two or three weeks old.[1] The parents claimed to have no idea what caused the earlier fractures.

Dr. Mark Massi, a forensic pediatrician, examined L.Z. He found that L.Z.'s weight-to-length ratio was in the bottom 2.1 percent; his body mass index was in the bottom 2.3 percent. Dr. Massi concluded:

"This infant has multiple fractures with no evidence to suggest an underlying bone metabolic disorder.

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[1] Aside from the fact that both earlier fractures were approximately the same age, the record does not indicate whether they were caused by one or two events.

"The history provided by the father may be a plausible explanation for the humerus fracture. He was not clear on how he grabbed the arm, however, other than to say he pulled the infant up by the arm. Excessive bending force, and not pulling, is the mechanism of injury for this fracture, which is suspicious for abuse.

"There is no explanation for the forearm fractures, which occurred several days prior to the humerus fracture; physical abuse is the most likely cause. These fractures went unnoticed by the caretakers and medical care was not sought, which is neglect.

"The low weight for length is suggestive of inadequate nutrition, which is neglect.

"Overall, this is a case of physical abuse and neglect."

The police interviewed the parents separately. When confronted with the fact that L.Z. had two older fractures, the father explained that, a few weeks earlier, L.Z. would not stop crying, so he wrapped him up and swaddled him; when he grabbed L.Z.'s arm and forced it into the swaddling, he heard a "pop." He added that the same thing also happened "a little bit prior to that on a different day," except that that time, he did not hear any pop. However, he insisted that L.Z.'s most recent injury happened by accident.

The mother said that "every time [L.Z.] goes to his father, [L.Z.] cries." She had told the father to spend 30 minutes a day with L.Z., "in hopes that he'd make a better connection." She insisted that she had never noticed L.Z. crying any more than usual, even after he sustained his most recent injury.

The police told the mother that the father "had confessed to injuring the baby." She became "extremely upset," started crying, and said that "she didn't want to have anything to do with [the father] any longer . . . ."

At that point, the Department of Children and Family Services (CFS) detained the children and filed dependency petitions concerning them. The children were placed with the mother's mother. The parents separated.

Dr. Heidi Knipe-Laird carried out a psychological evaluation of the father, at his attorney's request. She found him to be "an intelligent, competent person with significant strengths, which include willingness to accept full responsibility for having injured his child, initiative in seeking help for his dysfunctional behavior, and capacity for insight." He appeared to be genuinely remorseful (although he continued to "insist that the last incident . . . was an accident"). In her opinion, therapy could "be very helpful to him in his search . . . to prevent any reoccurrence of abusive parenting."

After a follow-up examination, Dr. Massi reported that L.Z.'s weight had "normalized," which confirmed that his previous low weight had been "due to insufficient nutrition."

In a subsequent interview, Dr. Massi opined that the father's account of the earlier fractures was "plausible," but he added that they required "extreme force" that "would not normally occur during regular infant care." He further opined that the earlier fractures would have been painful when the baby's arm was moved, such as during

dressing or bathing, so that a caregiver would have been able to tell that there was something wrong.

When asked about L.Z.'s low weight, both parents said that that was the first time they had been told about it. The mother provided L.Z.'s medical records to the social worker. They indicated that he lost some weight immediately after birth. The mother began supplementing breastfeeding with formula, and he started to gain weight. At a checkup when he was seven weeks old, the mother said she had stopped supplementing; however, his pediatrician considered his weight gain to be "adequate." At a further checkup when he was 14 weeks old, the mother still was not supplementing; the pediatrician did not express any concern about his weight.

Dr. Massi reviewed these records. He reported that they were consistent with his previous findings — that L.Z.'s weight-to-length ratio had been in the bottom three percent before removal and had normalized since removal.

In July 2015, the mother filed for legal separation from the father. She later amended her filing so as to seek a divorce.

In August 2015, at the jurisdictional/dispositional hearing, the trial court found that it had jurisdiction over L.Z. based on the nonaccidental infliction of serious physical harm (Welf. & Inst. Code, § 300, subd. (a)), failure to protect (*id*., § 300, subd. (b)), and severe physical abuse (*id*., § 300, subd. (e)). It further found that it had jurisdiction over A.Z. and S.Z. based on failure to protect (*id*., § 300, subd. (b)), and abuse of a sibling (*id*., § 300, subd. (j)). It formally removed the children from the parents' custody. It ordered

reunification services for the mother. However, it denied reunification services for the father based on the infliction of severe physical harm. (Welf. & Inst. Code, § 361.5, subds. (b)(5), (b)(6).)

In February 2016, the father filed a section 388 petition, seeking reunification services. The trial court denied the petition without a hearing.

Later in February 2016, when the trial court continued the six-month hearing, the father's counsel asked it to hold a hearing on the section 388 petition. The trial court indicated that it had denied the petition summarily because it found that granting it would not be in the best interest of the children; it refused to hold a hearing.

Also in February 2016, the mother had a 29-day trial visit with the children.

In March 2016, at the six-month review hearing, the trial court placed the children with the mother, under the supervision of CFS. It allowed the father to have supervised visitation once a week for two hours at a time.

II

ATTACKS ON THE JURISDICTIONAL FINDINGS

A surprising amount of the father's brief is devoted to challenging the jurisdictional findings. As he does not rely on any new evidence since the jurisdictional hearing (see *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1757), those findings are res judicata. (*In re Andrew L.* (2011) 192 Cal.App.4th 683, 690.) They are tangentially relevant to this appeal because, in ruling on the father's section 388 petition, the trial court could consider the problems that led to the dependency, as well as the

degree to which the father had removed or ameliorated those problems. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 224.) We therefore discuss the father's challenge here briefly.

First, in his briefs, the father questioned any findings based on L.Z.'s broken bones; he claimed there was evidence that L.Z. had an unusual hemoglobin pattern, which, in his view, could have made his bones brittle. At oral argument, however, his counsel conceded that this was a mistake. Actually, the record shows that L.Z.'s hemoglobin was normal.

Second, the father questions any findings based on L.Z.'s low weight. Significantly he does not dispute that L.Z.'s weight was in the bottom three percent before he was removed. Rather, he disputes Dr. Massi's conclusion that L.Z.'s weight "normalized" after he was removed. He relies on three graphs that Dr. Massi created, tracking L.Z.'s weight-to-age, length-to-age, and weight-to-length from birth to not quite six months. Each of these graphs compared L.Z.'s personal growth curve to a normal curve, an upper curve, and a lower curve. (Unfortunately, the upper and lower curves were not labeled as particular percentiles or otherwise.)

The father claims the graphs show that L.Z.'s weight-for-age "continued to decrease while in his grandmother's care." Not so. Actually, there is a gradual but visible uptick, away from the lower curve and toward the normal curve, after the date of

removal.[2] Moreover, Dr. Massi reported that L.Z. had gained an average of 19 grams a day since being removed, "a rate sufficient for normal growth plus catch-up growth." The weight-to-age graph appears consistent with this statement. L.Z.'s body mass index also increased. While his weight did not "normalize" in the sense of returning completely to normal (in just one month), it did "normalize" in the sense that it moved in a direction that would take it back to normal.

Admittedly, there was an issue as to whether the parents knew or should have known that L.Z. was severely underweight. Once his weight loss immediately after birth was corrected, his pediatrician expressed no further concern about his weight. However, the issue of their knowledge or negligence was fully litigated below, and the trial court nevertheless found "nutritional neglect." Because the parents already had two older boys, because the mother arbitrarily stopped supplementing, and because L.Z.'s weight improved after removal, this finding was supported by substantial evidence.

III

THE SUMMARY DENIAL OF THE FATHER'S SECTION 388 PETITION

The father contends that the trial court erred by denying his section 388 petition without a hearing.

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[2] The father also claims that L.Z.'s weight-to-age dropped from the 25th percentile to the 20th percentile. However, as the graphs are not labeled with percentiles, we fail to understand how he arrived at that conclusion.

A. *Additional Factual and Procedural Background*.

In his section 388 petition, the father asked the trial court to grant him reunification services.

As changed circumstances, he alleged that he had successfully completed individual counseling (eight sessions), a parenting class (ten sessions), and an online anger management class (52 sessions).

His counselor reported that, in his individual counseling, "triggers that led to a family crisis were actively explored. Strategies that can assist to prevent future crises were addresses. [The father] demonstrated the responsibility to take responsibility for poor parenting skills that resulted in the removal of his children. [The father] actively participated in all sessions and was receptive to psycho-education in order to strengthen parenting skills. Exploration of past and present life challenges appear [*sic*] to have increased the client's self-awareness; thus, allowing him to improve mood and functioning. Lastly, strategies that can assist to sustain progress made thus far were explored."

The father alleged that granting the petition would be in the best interest of the children because it "would help my children benefit from all the great changes I have made in my life. I am not a perfect father, but I feel I am finally the father my children need."

B. *Analysis.*

"Under section 388, a parent may petition to modify a prior order 'upon grounds of change of circumstance or new evidence.' [Citation.] The juvenile court shall order a hearing where 'it appears that the best interests of the child . . . may be promoted' by the new order. [Citation.] 'Thus, the parent must sufficiently allege *both* a change in circumstances or new evidence *and* the promotion of the child's best interests.' [Citation.]

"'A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause. [Citations.] It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing. [Citations.] While the petition must be liberally construed in favor of its sufficiency [citations], the allegations must nonetheless describe specifically how the petition will advance the child's best interests.' [Citation.] In determining whether the petition makes the required showing, the court may consider the entire factual and procedural history of the case. [Citation.]" (*In re K.L.* (2016) 248 Cal.App.4th 52, 61-62.) "We review a juvenile court's decision to deny a section 388 petition without an evidentiary hearing for abuse of discretion. [Citation.]" (*Id.* at p. 62.)

The trial court denied the petition because there was no evidence that granting it would be in the best interest of the children. We agree.

"The factors to be considered in evaluating the child's best interests under section 388 are: (1) the seriousness of the problem that led to the dependency and the reason for

any continuation of that problem; (2) the strength of the child's bond with his or her new caretakers compared with the strength of the child's bond with the parent, and (3) the degree to which the problem leading to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. [Citation.]" (*In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 224.)

Here, the reason for the dependency was extremely serious — the father broke his four-month-old baby's arm at least twice. The trial court found these injuries to be nonaccidental. Moreover, even though the earlier fractures would have caused the baby to suffer visible discomfort, the father did not seek medical care.

There is no indication that the children's bond with the father was particularly strong. While they were in the care of the grandmother, they were reportedly "thriving." There were "no issues" with the father's visitation, suggesting that they were not confused or acting out. Meanwhile, the children were placed with the mother; they "appeared happy and positively bonded with [her]."

Finally, the trial court could reasonably conclude that the father had not shown that the services he had obtained had eliminated or ameliorated the problem.

The father asks rhetorically, "How unusual is it for a parent to completely admit all of their wrongdoings in a dependency case?" But this is not that unusual case. In Dr. Massi's opinion, the father's account of how the baby came to be injured was not consistent with the injuries themselves. Even absent that opinion, the very fact that an infant's arm was broken twice within less than a month fairly shouts abuse. When the

earlier fractures of the radius and ulna were first discovered, the father had no explanation for them; not until the police interviewed him did he attribute them to swaddling mishaps. It is reasonable to conclude that the father did not hurt the baby by accident, as he claimed, but rather intentionally. However, he has never admitted this.

His counselor praised his progress; in her opinion, he had "demonstrated the ability to take responsibility for poor parenting skills that resulted in the removal of his children." However, as long as he maintained that he did not injure the baby intentionally, her opinion had no foundation. There was no indication that his parenting classes addressed physical abuse. His anger management class was a 52-week online program;[3] he did not provide any information about what was covered in it. It is not unusual for a parent to *complete* reunification services without *benefiting* from them. Here, there was no factual showing that the father had *benefited*.

We therefore conclude that the trial court did not err by summarily denying the father's section 388 petition.

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[3] The father repeatedly claims that "[t]he [online] class was supplemented with psychotherapy sessions as well as personal study." Not so. The online provider *recommended* that "supplemental psychotherapy sessions with a trained psychotherapist . . . be completed in conjunction with the online program"; it added, "We believe the most beneficial and long lasting outcomes result from online personal study as well as talk therapy." But there is no evidence that the father *engaged in* any psychotherapy sessions (other than his individual counseling) or in any personal study (other than the online anger management classes themselves).

IV

INSUFFICIENT VISITATION

The father contends that the trial court erred, from the inception of the case, by failing to allow him sufficient visitation.

A. *Additional Factual and Procedural Background*.

In June 2015, at the dispositional hearing, the trial court allowed the father supervised visitation once a week, for a minimum of two hours at a time.

In August 2015, at the jurisdictional/dispositional hearing, it ordered the same visitation.

In February 2016, it continued the six-month review hearing; at the same time, it once again ordered the same visitation.

Finally, in March 2016, at the six-month review hearing, it ordered supervised visitation once a week for two hours at a time.[4]

The father did not raise any issue concerning visitation at any of these hearings.

B. *Discussion*.

Preliminarily, CFS contends that the father forfeited his contention by failing to raise it below.

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[4] The father asserts that his visitation was once a week for one hour at a time. While one social worker's report did say this, it did not correctly reflect the trial court's orders.

"[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) This forfeiture rule extends to visitation issues. (*In re Anthony P.* (1995) 39 Cal.App.4th 635, 640-642 [sibling visitation].)

Here, the father never objected to the amount of visitation.[5] He claims that he did raise visitation in his section 388 petition. In it, he stated, "I would like the judge to please offer me re-unification services . . . . I would like to start begin by being allowed to have more visitation hours." In context, this was a claim that, as a result of *changed circumstances*, he was entitled to *additional* visitation as a component of reunification services. That is different from his claim on appeal that the trial erred *all along* by failing to allow him *sufficient* visitation. In any event, in order to preserve his contention, the father had to object again when the trial court made the challenged orders.

It is particularly ironic that, under the heading of this argument, the father lambastes the trial court, minors' counsel, and, implicitly, the social worker for supposedly ignoring the issue of visitation. If the father and the father's own counsel did

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[5] One social worker's report stated, "The father has voiced wanting more visitation time with his children and CFS will continue to assess his request." But while he may have raised the issue with CFS, if the outcome was unsatisfactory, he still had to raise the issue with the trial court. Because he failed to do so, the trial court could reasonably conclude that he and CFS had resolved the problem.

not see fit to bring it up, we see no reason why the court or the other parties should. He argues that minors' counsel had a statutory obligation to advise the court of the older children's wishes. (See Welf. & Inst. Code, § 317, subd. (e)(2).) However, we do not know what those wishes were. If they were consistent with what the trial court ordered, there was no need for minors' counsel to do anything further. The father cannot show that he was prejudiced.

Even apart from forfeiture, the father's contention lacks merit, for three reasons.

First and foremost, he has not shown why visitation for two hours once a week was inadequate. He cites the mother's opinion, based on "the literature she had research[ed] about bonding," that a father should spend 20 to 30 minutes a day caring for a baby. However, she was not an expert. Also, she was not addressing visitation, and she did not discuss whether two hours a week could be an adequate substitute. Her stray comment falls far short of showing an abuse of discretion.

Second, the June and August 2015 visitation orders have become final and are not open to challenge in this appeal. "If an order is appealable, . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata. [Citation.]" (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.) The father complains that it is the "routine practice of the San Bernardino County child dependency courts to order only one visit per week at the time a child dependency petition is filed" and that this practice "ha[s] got to be stopped." Even so assuming, it cannot be stopped by means of this appeal.

The February and March 2016 orders, on the other hand, were not prejudicial. The trial court had already denied the father reunification services, and it had already denied his section 388 petition. Thus, it cannot be argued that inadequate visitation hindered his chances of reunification. It is still open to him to seek increased visitation at any time.

V

DISPOSITION

The orders appealed from are affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.